3-16-08

No. 07-639

In the Supreme Court of the United States

ZEN HUA DONG, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the fiancé of a person who was forced to undergo an abortion pursuant to a coercive population control policy is not automatically eligible for "refugee" status under 8 U.S.C. 1101(a)(42).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-95a) is reported at 494 F.3d 296. The decisions of the Board of Immigration Appeals (Pet. App. 96a-102a) and the immigration judge (Pet. App. 118a-125a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2007. On October 1, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 14, 2007, and the petition was filed on November 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General may grant asylum to an alien who qualifies as a "refugee" under 8 U.S.C. 1101(a)(42). A "refugee" is a person who is unable or unwilling to return to his or her native country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. 1101(a)(42)(A); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987).

In 1989, the Board of Immigration Appeals (BIA) rejected an asylum applicant's claim that implementation of China's "one couple, one child" policy, even if it results in the applicant's involuntary sterilization, is persecution or creates a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989).

In 1996, Congress amended the INA's definition of "refugee" to include the following:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. 1101(a)(42); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 601(a), 110 Stat. 3009-689; see also H.R. Rep. No. 469, 104th Cong., 2d Sess. 173 (1996) (stating that IIRIRA § 601(a), 110 Stat. 3009-689, was enacted in response to the *Chang* decision).

The BIA has held that the spouse of a person who has been forced to undergo an abortion or sterilization may qualify for asylum under the revised definition of "refugee" in 8 U.S.C. 1101(a)(42). See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917-918 (B.I.A. 1997) (en banc). Neither the BIA nor any court of appeals has held that a boyfriend or fiancé of a person forced to undergo an abortion or sterilization may automatically qualify for asylum under that provision.

2. Petitioner, a native and citizen of the People's Republic of China, entered the United States in 1999 without valid admission documentation and was placed in removal proceedings. Pet. App. 119a. He was charged with being inadmissible under 8 U.S.C. 1182(a)(7)(A)(i)(I), as an applicant for admission who did not possess or present the proper documentation for admission. Pet. App. 7a, 118a-119a; A.R. 181. Petitioner conceded removability but sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. Pet. App. 119a.

At a hearing before an immigration judge (IJ), petitioner provided testimony through his written asylum application. The parties stipulated that if petitioner had testified, his testimony would have been credible and consistent with his asylum application. Pet. App. 120a-121a.

Petitioner's written asylum application stated that he and his fiancée began living together in September 1997. Pet. App. 97a. At the time, they were too young to legally marry. *Ibid.* Petitioner's fiancée became pregnant, and government officials forced her to have an abortion. *Id.* at 97a-98a. According to petitioner, family planning officials warned him that he would be fined and sterilized if it happened again. *Id.* at 98a. About a year later, petitioner's fiancée became pregnant again. *Ibid.* Fearing that family planning officials would force him to undergo sterilization, petitioner left China for the United States. *Ibid.* Officials located his fiancée and forced her to undergo another abortion. *Ibid.* She then left China and now lives in Taiwan. *Ibid.*

Because the parties' stipulation was limited to petitioner's asylum application, and did not cover his CAT claim, petitioner testified regarding that claim. A.R. 51-52. He stated that, if returned to China, he would be jailed, fined, and beaten because he left the country without permission, and that birth control officials would arrest him. Pet. App. 121a.

The IJ found petitioner removable as charged and denied his applications for asylum, withholding of removal, and protection under the CAT. Pet. App. 118a-125a. The IJ held that petitioner failed to establish past persecution based on his fiancée's forced abortions. *Id.* at 122a-123a. The IJ noted that the BIA held in *C-Y-Z-* that the *spouse* of a person who was forced to undergo an abortion or sterilization pursuant to a coercive population control policy is automatically deemed eligible for asylum under 8 U.S.C. 1101(a)(42). Pet. App. 122a. But she noted that the BIA "has not further extended the protections of this amended definition of refugee to fiancées or girlfriends or boyfriends of people

who have been forced to undergo an involuntary abortion or sterilization," and she therefore rejected petitioner's claim. *Ibid.*

In addition, the IJ held that petitioner's alleged fear of future persecution was "entirely hypothetical" because petitioner "has no legal spouse on which [to] premise such a claim" and because petitioner's fiancée "is currently living in Taiwan and, therefore, in the future would not be subject to the family planning laws of the People's Republic of China." Pet. App. 123a.

Finally, the IJ held that petitioner failed to demonstrate that it is more likely than not that he would be tortured if he returned to China. Pet. App. 123a. The IJ noted that illegal departure from China was punishable by administrative detention or fines, not torture, and that petitioner would not face a likelihood of torture under the family planning laws, because his fiancée was now living in Taiwan and "whatever measures the authorities felt were appropriate under the family planning laws have already been taken against his girlfriend." *Id.* at 124a.[1]

The BIA summarily affirmed. Pet. App. 117a.

3. Petitioner sought review in the court of appeals. Pet. App. 103a-116a. His case was consolidated with two other cases in which boyfriends or fiancés of persons subjected to coercive population control practices challenged the BIA's decisions that they were not automatically eligible for asylum based on the persecution of their girlfriends or fiancées. *Id.* at 106a-108a.

The court of appeals remanded the cases to the BIA, declining to review the decisions until the BIA "explain-

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[1] Petitioner did not appeal the IJ's denial of his CAT claim, and that claim therefore is not before this Court.

ed how or why, in the first instance, it construed IIRIRA § 601(a) to permit *spouses* of those directly victimized by coercive family planning policies to become eligible for asylum themselves." Pet. App. 113a (emphasis added). The court of appeals also asked the BIA to address whether, assuming spouses are automatically eligible for asylum, boyfriends or fiancés are also automatically eligible for asylum. *Id.* at 115a-116a.

4. The en banc BIA reaffirmed that spouses of those forced to undergo forced abortions or sterilization are automatically eligible for asylum under 8 U.S.C. 1101(a)(42). Pet. App. 126a-160a (*S-L-L-*).[2] The BIA stated that "[t]here is no clear or obvious answer to the scope of the protections afforded by the [IIRIRA] amendment to partners of persons forced to submit to an abortion or sterilization." *Id.* at 131a. However, emphasizing what it viewed as the congressional purpose underlying the amendment—"to afford refugee status to persons whose fundamental human rights were violated by a government's application of its coercive family planning policy"—the BIA determined that the statute should be interpreted to provide spouses with automatic asylum eligibility. *Id.* at 133a-134a. The BIA noted that a married couple has "shared responsibility" for family planning under China's laws, and it stated that "[a] forced abortion * * * naturally and predictably has a profound impact on both parties to the marriage." *Id.* at 135a-136a.

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[2] The BIA considered the questions posed by the court of appeals in *S-L-L-*, Pet. App. 126a-198a, which was one of the cases consolidated with petitioner's case by the court of appeals. The BIA then applied its legal reasoning to petitioner's case in another opinion. See *id.* at 96a-102a.

The BIA then concluded that boyfriends or fiancés are not per se eligible for refugee status under Section 1101(a)(42). Pet. App. 138a-142a. It explained that the "spousal eligibility rule" it adopted in *C-Y-Z-* "relies on marriage as the linchpin" and that the logic of the spousal eligibility rule does not extend to boyfriends or fiancés:

> [T]he sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father. From the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancée.

Id. at 138a.

The BIA noted, however, that unmarried partners may establish asylum eligibility by demonstrating that they have been or will be persecuted for *their own* resistance to a coercive population control program. Pet. App. 140a-142a; see 8 U.S.C. 1101(a)(42) ("[A] person * * * who has been persecuted * * * for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.").

The BIA affirmed the decision in petitioner's case in a separate opinion. Pet. App. 96a-102a. Relying on its decision in *S-L-L-*, the BIA held that "an unmarried partner claiming persecution based on a partner's forced abortion or sterilization must demonstrate that he or she qualified as a refugee under the terms of the 'other resis-

tance' clause in [8 U.S.C. 1101(a)(42)]." Pet. App. at 97a. The BIA concluded that petitioner did not demonstrate past persecution based on "other resistance," because the mere act of impregnating one's fiancée does not constitute "resistance," and because petitioner did not express resistance when he was warned by family planning officials after his fiancée's first abortion. *Id.* at 100a. In addition, the BIA concluded that petitioner failed to demonstrate a well-founded fear that he would be sterilized upon his return to China, since his fiancée was now residing in Taiwan and if petitioner and his fiancée returned to China, they could legally marry and have children. *Id.* at 101a. The BIA also concluded that petitioner failed to demonstrate a well-founded fear of persecution on account of his departure from China without permission, because petitioner failed to demonstrate that any punishment he may face for an illegal departure would be of sufficient severity to amount to persecution or that it would be on account of a protected ground. *Ibid.*

5. The en banc court of appeals affirmed. Pet. App. 1a-95a. It agreed with the BIA that "none of the petitioners can qualify for automatic refugee status as a result of the treatment of their girlfriends or fiancées," *id.* at 34a, and it noted that every circuit that had considered the issue had come to the same conclusion, *id.* at 4a n.4. The court explained that, in its view, the statutory text clearly and unambiguously grants automatic refugee status only to the person who was subjected to the involuntary sterilization or abortion, and not to his or her partner. *Id.* at 16a, 24a; see 8 U.S.C. 1101(a)(42) (stating that "a *person* who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of

political opinion" (emphasis added)). The court noted that the statute repeatedly refers to "a person" who has been victimized, and "[u]nder the language used by Congress, having someone else, such as one's spouse, undergo a forced procedure does not suffice to qualify an individual for refugee status." Pet. App. 16a. The court thus "affirm[ed] the result of the BIA's decision in *S-L-L-* denying *per se* refugee status to boyfriends or fiancés of individuals who have been persecuted directly under coercive family control policies." *Id.* at 33a. It noted, however, that a boyfriend or fiancé could be deemed automatically eligible for asylum if he demonstrated *his own* "resistance to a coercive population control program." *Id.* at 24a (quoting 8 U.S.C. 1101(a)(42)).

Although none of the petitioners were married to their partners, the court of appeals went further and rejected the BIA's conclusions in *C-Y-Z-* and *S-L-L-* that *spouses* of those subject to forced abortions or sterilization are automatically eligible for asylum under 8 U.S.C. 1101(a)(42). Pet. App. 12a-34a. That conclusion was also premised on the court's view that the "the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer." *Id.* at 21a.

Assessing the merits of petitioner's claim, the court held that he was not automatically eligible for asylum based on his fiancée's forced abortions, Pet. App. 33a-35a, and that he failed to demonstrate "that he acted in a manner that could constitute 'resistance' or opposition to a coercive family control program," *id.* at 35a. The court also concluded that petitioner failed to demonstrate a well-founded fear of future persecution on account of a threat that the Chinese government would

sterilize him if his fiancée became pregnant again, reasoning that petitioner's fear of sterilization was "conjectural" because his fiancée had moved to Taiwan and because, if she and petitioner returned to China, they could now legally marry. *Ibid.*[3]

In a number of concurring and dissenting opinions, all of the other judges who reached the question agreed with the *en banc* majority that a boyfriend or fiancé of a person forced to undergo an abortion is not automatically eligible for asylum under 8 U.S.C. 1101(a)(42). See Pet. App. 37a-38a (Katzmann, J., concurring in the judgment) ("The question the parties dispute * * * is whether the BIA's interpretation of the statute as applied to boyfriends and fiancés is reasonable. Every judge on this Court who reaches this issue agrees that it is."); see also *id.* at 61a-62a, 74a-75a (Sotomayor, J., concurring in the judgment). Several of the judges took issue with the majority's decision "to go far beyond" the question presented to address the "unbriefed, unargued, and unnecessary" question whether spouses of persons subject to forced abortions are automatically eligible for asylum. *Id.* at 61a (Sotomayor, J., concurring in the judgment); see *id.* at 37a-38a (Katzmann, J., concurring in the judgment).

ARGUMENT

The court of appeals correctly determined that a boyfriend or fiancé is not automatically deemed eligible for asylum if his partner is forced to undergo an abortion.

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[3] Petitioner does not renew his claim that he has been persecuted or will be persecuted for "other resistance" to a coercive population program, nor does he renew his claim that he has a well-founded fear of future persecution because he will be sterilized if returned to China. He has therefore abandoned those claims.

There is no disagreement in the courts of appeals on that issue. All of the circuit courts that have considered the issue, as well as the BIA, have concluded that boyfriends and fiancés of persons subjected to coercive population control policies are not automatically eligible for asylum. Although there is disagreement in the courts regarding whether the *spouse* of a person forced to undergo an abortion is automatically eligible for asylum, this case does not raise that issue, because petitioner and his fiancée are not married.

In any event, this Court should not consider the question presented, or the related question of whether a person may be automatically eligible for asylum based on a *spouse's* forced abortion, at this time, because the Attorney General has recently certified a BIA decision to himself to revisit the BIA's "spousal eligibility rule." It would be premature for this Court to review these issues before giving the courts of appeals an opportunity to consider the decision to be rendered by the Attorney General on certification.

1. The court of appeals correctly held that a boyfriend or fiancé of a person forced to undergo an abortion is not automatically eligible for asylum under the INA. The relevant statutory provision provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political opinion." 8 U.S.C. 1101(a)(42). The plain text of the statute does not compel the conclusion that a boyfriend or fiancé of a person forced to abort a pregnancy is deemed to have been persecuted. The BIA and the court of appeals agree on this point. The BIA noted in *S-L-L-* that Section 1101(a)(42) "does not explicitly refer to spouses," boyfriends, or fiancés. Pet. App. 132a; see

id. at 138a-139a. The court of appeals came to the same conclusion, finding that the text of the statute does not extend automatic asylum eligibility to boyfriends or fiancés. *Id.* at 13a-14a, 33a.

Moreover, the BIA and the court of appeals agree that the INA cannot reasonably be interpreted to extend automatic asylum eligibility to a boyfriend or fiancé of a person subject to a forced abortion, although they come to that conclusion in different ways. In *S-L-L-*, the BIA found the statute ambiguous on the question of spousal eligibility, but interpreted the statute to include spouses based on the purposes underlying the statute: "Although there is no specific reference in the statutory definition of a refugee to a husband's claim based on harm inflicted upon his wife, the general principles regarding nexus and level of harm apply in determining such a claim," because Chinese law "explicitly imposes joint responsibility on married couples for decisions related to family planning." Pet. App. 132a-134a. But the BIA limited its holding to spouses, stating that *C-Y-Z-* "relies on marriage as the linchpin," because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *Id.* at 138a. The court of appeals followed a different path but came to the same result, holding that the statute unambiguously provides automatic asylum eligibility only for the person who was forced to undergo an involuntary abortion or sterilization. *Id.* at 12a-35a.[4]

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[4] Moreover, the court of appeals agreed with the BIA that a boyfriend or fiancé of a person forced to undergo an abortion may obtain automatic asylum eligibility only by demonstrating his own "resistance to a coercive population control program." See Pet. App. 33a-35a (court of appeals), 140a-142a (BIA).

Regardless of how one arrives there, the conclusion of the BIA and court of appeals is correct. The statute does not cover boyfriends or fiancés by its terms, and the significant differences between married and unmarried couples preclude extension of the statute to boyfriends and fiancés. The BIA has reasonably explained that, assuming that the INA may be read to permit spouses to be automatically eligible for asylum, it cannot be read to make boyfriends or fiancés automatically eligible for asylum, for two reasons. First, reliance on marital status is appropriate because "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the [INA]." Pet. App. 139a; see *Chen* v. *Ashcroft*, 381 F.3d 221, 227 n.6 (3d Cir. 2004). Second, a legally married couple occupies a fundamentally different position in society than a couple that is not married: "An underage couple living in an unregistered de facto marital relationship [that] is not recognized as a married couple by the Government * * * do[es] not have the legal rights and obligations of a married couple." Pet. App. 143a n.13; see *id.* at 138a-139a. Thus, even assuming there is some ambiguity in the definition of "refugee," as petitioner claims (Pet. 19-22), the BIA has reasonably concluded that the statute should not be interpreted to extend automatic asylum eligibility to boyfriends and fiancés.[5] Further review of petitioner's claim is therefore unwarranted.

2. There is no disagreement in the circuits about whether a boyfriend or fiancé of a person forced to un-

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[5] Petitioner appears not to take issue with this conclusion, for he states that the "reasonableness of not applying *C-Y-Z-* to asylum applicants such as petitioner" is "not presented by this petition." Pet. 14 n.4.

dergo an abortion is automatically eligible for asylum under 8 U.S.C. 1101(a)(42). All of the courts of appeals that have considered the question have held that a boyfriend or fiancé is not per se eligible. See Pet. App. 33a; *Lin Chen* v. *Gonzales*, 457 F.3d 670, 674 (7th Cir. 2006) ("Like our sister circuits, we decline to extend the definition of 'refugee' to reach boyfriends."); *Wang* v. *United States Att'y Gen.*, 152 Fed. Appx. 761, 769 (11th Cir. 2005) (unpublished) (holding that the INA's "forced sterilization or abortion provision [does not] extend to a boyfriend for purposes of meeting the statutory definition of a 'refugee'"); *Chen*, 381 F.3d at 228-229 (deferring to the BIA's decision that its "spousal eligibility rule" does not extend to boyfriends or fiancés).[6] Petitioner has thus failed to demonstrate any disagreement in the lower courts on the question that is actually presented by the facts of this case, and the petition should thus be denied. Sup. Ct. R. 10.

Petitioner contends (Pet. 16-17) that certiorari review is warranted on a separate question, which is whether a person whose *spouse* was forced to undergo an abortion or sterilization is automatically eligible for asylum under the INA. There is disagreement on that question in the circuits, because the court's discussion of that issue in the decision below disagrees with the published decisions of the Third, Seventh, and Ninth Cir-

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[6] There are courts that have found, relying on the BIA's "spousal eligibility rule," that a person who participated in a traditional marriage ceremony with, but was not legally married to, a person later forced to undergo an abortion is automatically eligible for asylum under 8 U.S.C. 1101(a)(42). See *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma* v. *Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004). That question is not presented in this case, because petitioner has not married his fiancée, either legally or traditionally. Pet. App. 97a-98a.

cuits, all of which have deferred to the BIA's "spousal eligibility rule." Pet. App. 4a n.4 (citing *Chen* v. *Attorney General of the United States*, 491 F.3d 100, 108-109 (3d Cir. 2007); *Zhang*, 434 F.3d at 1001; *He* v. *Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003)).[7] This case, however, does not raise that issue. It is undisputed that petitioner is unmarried, and thus *no* court of appeals would find him automatically eligible for asylum based on his fiancée's forced abortion. *Id.* at 13a ("[P]etitioners in this case are unmarried partners, and not spouses, of individuals who have been subjected to forced abortions."); see pp. 13-14, *supra*.

Although the majority below addressed the question whether spouses are automatically eligible for asylum, that discussion was not necessary to resolve this case. See Pet. App. 61a-62a (Sotomayor, J., concurring in the judgment). This case thus would not be an appropriate vehicle for resolving the question whether a spouse is automatically eligible for asylum based on his spouse's forced abortion, even if that issue otherwise warranted review. Because there is no dispute about whether boyfriends and fiancés are automatically eligible for asylum, and this case does not raise the question of spousal eligibility, further review is not warranted.

3. In any event, review of the question presented by this case, or the separate question of spousal eligibility, would be premature because the Attorney General is now considering whether the agency's position should be modified. In the decision below, the court of appeals rejected the BIA's spousal eligibility rule, holding that

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[7] The Fifth and Sixth Circuits have also deferred to the BIA's interpretation in unpublished decisions. See *Li* v. *Ashcroft*, 82 Fed. Appx. 357, 358 (5th Cir. 2003); *Huang* v. *Ashcroft*, 113 Fed. Appx. 695, 698-699 (6th Cir. 2004).

the statutory provision conferring refugee status on asylum applicants who have been subjected to involuntary sterilizations or abortions does not provide the spouses of such persons with a per se entitlement to refugee status. See Pet. App. 4a. The Third Circuit then issued a *sua sponte* briefing order in another case, *Shi* v. *Attorney General of the United States*, No. 06-1952 (July 27, 2007), slip op. 1, suggesting that it wished to revisit the spousal eligibility rule. In response, the Attorney General directed the BIA to refer the agency's decision in *Shi* to him so that he could review the spousal eligibility rule. See 8 C.F.R. 1003.1(h)(1)(i). The Attorney General instructed the parties to submit briefs addressing

> all relevant statutory questions including, but not limited to, whether IIRIRA § 601(a), codified at 8 U.S.C. § 1101(a)(42), is ambiguous or silent on the availability of refugee status for spouses or partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of Section 601(a) set forth in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) and *Matter of S-L-L-*, 24 I. & N. Dec. 1 (2006) is correct.

Att'y Gen. Order No. 2905-2007, at 1 (Sept. 4, 2007); see Pet. 18 n.5 (noting the Attorney General's certification order).

The Attorney General therefore has undertaken to assess the Department's position with respect to whether a person who has not personally suffered a forced abortion or sterilization may automatically obtain asylum on the basis of his or her partner's persecution. The facts of *Shi* are different from this case, in that the applicant in *Shi* was legally married to the person arguably subject to coercive population control measures.

See *In re Shi*, No. A 95 476 611 (Immigr. Ct. Nov. 8, 2004), slip op. 4-6. Nonetheless, the Attorney General's resolution of *Shi* may impact this case, because the Attorney General's certification order mentions both married and unmarried partners. Moreover, to the extent there is disagreement in the circuits about the spousal eligibility rule, that disagreement may be resolved once the Attorney General issues his decision and courts then have the benefit of that definitive position. This Court therefore should decline to consider the question presented, or the separate question of spousal eligibility, at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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